THE ENFORCEMENT PROVISIONS OF THE SHERMAN LAW[1]

It is proposed to discuss in this paper some features of the federal Anti-Trust act which are, in a sense, fundamental, but which have not received the attention that they deserve, viz., the administrative provisions of the act of 1890. In the enormous mass of literature upon the subject the discussion turns exclusively either upon the question of construction and power, or upon the question of economic wisdom and expediency. It seems to be forgotten that there are principles of legislation irrespective of constitutional limitations and of economic facts and tendencies which cannot be ignored with impunity and which, in the long run, will be sure to assert themselves.

It is necessary to go with a few words into the genesis of the so-called Sherman law. The occasion for it is to be found in two well-known historical facts: the first, that toward the end of the eighties of the last century there was widespread and in many quarters extremely bitter sentiment against capitalistic combinations; the second, that in the absence of a common law of the United States there was no federal governmental power to proceed against such combinations in the domain of interstate and foreign commerce. The states in dealing with purely domestic combinations were aided by the common-law illegality of conspiracies at least to this extent that corporations entering upon combinations of a character prejudicial to the public could be proceeded against by the attorney-general.[2] The common law however was generally deemed inadequate to deal with the evil because its rules were too indefinite and because its penalties appeared to an aroused, if not enlightened, public sentiment as not sufficiently heavy. At any rate even before legislation was enacted by Congress a number of states had passed statutes threatening combinations and trusts

[1] A paper read before the Western Economic Society at Chicago, March 1, 1912.

[2] *People* v. *Duke*, 44 N.Y.S., 336; *People* v. *Milk Exchange*, 145 N.Y., 267.

with Draconic penalties which were never carried into effect, and this legislative movement continued until the end of the nineties.

The first bill introduced into Congress by Senator Sherman, on December 4, 1889, shows the traces of the same legislative tendency. It failed to provide for any civil proceedings by the government, but declared that every person entering into a combination should be guilty of high misdemeanor punishable by a fine and by imprisonment in the penitentiary for not exceeding five years. It is not likely that Senator Sherman had given any considerable thought to the penal provisions of his bill. At any rate he speedily abandoned that part of his measure. In a bill reported on March 21, 1890, from the Committee on Finance, the penal provisions were entirely omitted except for a right to recover double damages given to parties aggrieved, but on the other hand the federal courts were now given jurisdiction of all suits at common law or in equity arising under the act, and were empowered to issue all remedial orders, processes, or writs to enforce its provisions; and the attorney-general and the district attorneys were directed to commence and prosecute all such cases to final judgment and execution—a provision which apparently had not been worked out with care. In speaking on this bill, Senator Sherman said:

> In the present state of the law it is impossible to describe in precise language the nature and limits of the offenses in terms specific enough for an indictment. I am clearly, therefore, of the opinion that at present, at least, it is not wise to include this section [meaning the section providing for penalties] in this bill. Such penalties may come later when the limits of the power of Congress over the subject-matter shall be defined by the courts.

The pressure for penal sanction was however too strong to be resisted. Senator Reagan offered as a substitute the original section providing a penitentiary sentence and an additional provision that every day on which the law should be violated should be held a separate offense, so that the famous $29,000,000 fine might have been rivaled by penitentiary sentences aggregating centuries. Such was the idea entertained by the senator from Texas of a statesmanlike method of dealing with a difficult problem. A compromise was finally reached and a bill agreed upon in the form in which it has become a law. It reduced the direct penalty to a fine not exceeding

$5,000 and imprisonment not exceeding one year, and on the other hand, put in very much clearer terms the power of the government to proceed against combinations and trusts by suits in equity. This bill retained the right of the aggrieved party to recover penal damages which were now made threefold, and also introduced a clause of forfeiture relating to property in course of transportation under any combination, a clause which up to the present, the government has never sought to enforce.

In order to understand fully the operation of the enforcement provisions of the law, the history of the meaning and interpretation of its substantive prohibitions must be briefly examined. These being intended to supply the absence of a federal common law, and to strengthen common-law principles by adequate sanctions, the common law must be the starting-point of the examination.

Making due allowance for the vagueness of common-law principles which had long been inextricably mixed up with statutes and with the exercise of the royal police power through Privy Council orders and proceedings,[1] we find the following state of the law: it was unlawful for two tradesmen separately engaged in business to make common cause against their customers, or against the consuming or purchasing public—unlawful in the sense that agreements with that object in view were unenforceable; such agreements being in restraint of competition or, as the expression is, in restraint of trade. It was indifferent whether competition in the particular case was economically beneficial or unwise. However, not every agreement in restraint of trade was unlawful in the sense of being punishable or even actionable.[2] If it did become criminal at all, it was not until it inflicted or threatened acts prejudicial to the public, when it might constitute a criminal conspiracy.[3]

[1] R. L. Galloway, *Annals of Coal Mining of London*, 1898, p. 96: "The remedies propounded were that the Lords of the Privy Council would take order that all owners and farmers of coal mines might open them and make sale of their coals at reasonable rates, not exceeding the price of 7 sh. the chaldron, and to lade the same at the most opportune places without any restraint" (about 1590).

[2] Mogul Steamship Company case, 1892, A.C. 25.

[3] *People* v. *Sheldon*, 139 N.Y., 251. This case arose under the New York law of criminal conspiracy as codified in the Penal Code, which presumably intended to state the common law.

It is safe to say that in 1890 there was no person in the English-speaking world who could pronounce with certainty or authority on the scope of the crime of conspiracy at common law. If the common-law offense existed with the qualification indicated, the line between unenforceability and punishability was a matter of degree, or at least of considerations which eluded definition. The Sherman act expressed no distinction between unenforceable and punishable, but apparently treated every unlawful combination as an offense.

But while it was unlawful at common law for two tradesmen, so long as they were doing business separately, to make common cause against the public, it was entirely lawful for them to form a partnership. Nor did the common law set any bound to the size of partnerships or the capital employed in them. But the common law as well as early statutes prohibited certain practices tending to engross or forestall commodities on their way from the producer to the consumer.[1] The Sherman act generalized this prohibition by making it unlawful to monopolize or to attempt to monopolize a trade.

Here then it was the difference, not between unlawful in the sense of unenforceable and unlawful in the sense of punishable, but the difference between lawful and unlawful, which was entirely a matter of intent or of degree, and the course of industrial enterprise was beset by an entirely new peril.

The Sherman act therefore advanced in two respects beyond the common law: literally interpreted, it made agreements which at common law had been merely null and void, subject to governmental prosecution; and literally or liberally interpreted, it created, without defining it, a new offense called monopoly. In this failure to define the new offense the act violated the most elementary principles of criminal legislation.

The literal interpretation was sustained by the Supreme Court in two Traffic cases decided in 1897 and 1898.[2] In the Standard Oil case, however, the Supreme Court made certain observations which have been generally understood as meaning that the common-law test of prejudice to the public would be applied to combinations

[1] Blackstone's *Commentaries*, IV, 158.

[2] The Trans-Missouri case, 166 U.S., 290; the Joint Traffic case, 171 U.S., 505.

if proceeded against by the government. It had been urged in the Traffic cases that in view of the enactment of the Interstate Commerce law, which placed railroad rates on a basis of reasonableness controlled by publicity and governmental power, rate agreements had become not merely an economic but a legal necessity; and it is difficult to understand how that argument could have failed to prevail. The dissenting opinion, written by Justice White, accepted this view.[1] It was Chief Justice White who wrote the opinion in the Standard Oil case, and it is not surprising that he did not acquiesce in an interpretation of the law which he must have regarded as unreasonable.

The result, however, of the broader view was that again, as at common law, the line between unenforceable and liable to prosecution became one of degree and intent.

It is noteworthy and characteristic that the contention was at once advanced that if the commission or non-commission of the offense depended upon criteria thus vague and governed by subjective differences of opinion, there was a denial of due process and that therefore the criminal part of the statute must be held unconstitutional. The contention did not prevail in the lower court,[2] and it is very doubtful whether it will prevail ultimately, for the common law had recognized offenses liable to the same objection, and a statute that satisfies the standards of the common law is not apt to be condemned as violating constitutional limitations. However, if the objection of vagueness and indefiniteness is well taken, it affects the soundness of the principle of the penal clauses of the act; and this point is not disposed of by affirming their constitutionality.

What has been the experience with the attempts to enforce the Sherman act by criminal prosecutions? From the time the act went into effect until 1910 thirteen prosecutions had been started of which four were pending in 1910.[3] Of the nine suits finally

[1] See 166 U.S. 314–16, 339, 367, etc.

[2] Decision rendered by Judge Kohlsaat; see *Report of Attorney-General for 1911*, p. 9.

[3] According to the *Report of the Attorney-General for 1911* there are six additional cases pending at the present time.

disposed of, seven were unsuccessful. In twenty years, therefore, only two convictions were obtained; and none was obtained until President Roosevelt's administration in 1907. No criminal prosecution has ever been even undertaken where it was a case of monopoly pure and simple, as distinguished from a case of combination between separate concerns; no attempt has been made to forfeit property, and no sentence of imprisonment has been carried out.[1]

This record of failure of the criminal provisions of the law must be ascribed to the inherent weakness if not viciousness of the penal sanction in a law of this character. From a larger point of view it is a matter of relative indifference whether the government will win or lose the pending criminal cases;[2] in the present state of the law the policy of treating trusts as crimes must be doomed to failure. Quite apart from the great question of economic justification or inevitableness, and conceding that the tendency toward combination should be checked by governmental action, the state has no moral right to create an offense where it is unable to define in advance with precision and so as duly to advise parties the line between what is legal and what is illegal.

It is futile to rely upon the analogies of common-law crimes. The offense of criminal conspiracy at common law has long been discredited because the same vagueness allowed it to be used as a weapon of oppression and class government; in many jurisdictions, including England, it has become obsolete, and it is unknown to modern continental criminal codes.

The common-law offense of nuisance was and is less objectionable because it deals with acts and conditions which at best are noxious and offensive; the vagueness of that offense, however, likewise proved entirely ineffectual to cope with conditions inimical to the public welfare, and had to yield to the elaborate systems of health and safety regulations that have set up standards possessing at least the merit of certainty.

[1] A sentence of imprisonment was rendered in the Naval Stores case and an appeal is pending.

[2] Since the above was written, the prosecution in the Packers' case has resulted in an acquittal, and the prosecution of the Sugar Trust in a disagreement.

The treatment of a combination or of a business which up to a certain point is lawful, as a criminal offense, simply because it transcends an undefinable line, has impressed itself as an anomaly upon all thoughtful students of this legislation, and the utterances of the federal courts upon this aspect of the law have been uniformly characterized by doubt and hesitancy.[1]

President Taft, in attempting to defend the law claimed that it required an element of duress to make the combination or monopoly criminal (see also 221 U.S., 182, 183). Had this been in the minds of the framers of the act, it would have been possible to clothe the idea in words, but the fact is they had no clear ideas, and thought it more convenient to leave the matter to be dealt with by the courts.

To quote another passage from a speech by President Taft:

> It is difficult to induce juries to convict individuals of a violation of the Anti-Trust law, if imprisonment is to follow. In the case of the Tobacco trust, the government declined to accept a plea of guilty by the individual defendants, offered on condition that only the penalty of a fine be imposed, and the result was that the jury did not hesitate to stultify itself by finding the corporation guilty and acquitting the individual defendants, who had personally committed the acts upon which the conviction of the corporation was based. In the early enforcement of a statute which makes unlawful, because of its evil tendencies, that which has been in the past regarded as legitimate, juries are not inclined by their verdicts to imprison individuals.

It may well be doubted whether, in view of this state of the law, the government has a moral right to ask for sentences of imprisonment. The inequitable character of this form of criminal punishment is aggravated by the fact that until 1889 the United States had had no occasion to create, except in connection with foreign and Indian affairs and with civil war and reconstruction, what may be called offenses against public policy, i.e., offenses which are not common and infamous crimes, and that to the present day the federal statute books contain no appropriate provisions for carrying out sentences against offenders of that class. One thing which American legislatures apparently seem entirely unable to learn is that the reckless enactment of penal provisions, far from aiding the enforcement of the law, will defeat its purpose, and incidentally

[1] See 186 Fed., 592; 55 Fed., 605, 638–41.

undermine the sense of legal obligation in the community. It is entirely proper that juries refuse to convict under statutes the framing of which evinces so little respect for sound principles of law.

Let us now consider the clause of the act conferring upon the federal courts jurisdiction in equity to enforce its provisions. This was a new departure in the legislation of Congress. Whence did it come? The records of Congress and other historical sources leave us without direct answer. However, it is to say the least a significant coincidence that on March 3, 1890, the Supreme Court of the United States sustained an Iowa statute which used the jurisdiction of the courts of equity for the purpose of enforcing the liquor legislation of the state,[1] and that on March 21, 1890, the bill using the like jurisdiction for enforcement purposes in connection with anti-trust legislation made its first appearance, while theretofore no such power to enforce penal statutes had been given by federal legislation.

From the beginning equity proved a more successful weapon in the hands of the government than criminal prosecution. During the first twenty years of the law's existence altogether thirty suits in equity were started of which at the end of that period nine were still pending. Of the twenty-one finally disposed of only five ended with a defeat of the government, and this defeat was due to the constitutional difficulty of determining what was interstate commerce, and not to any difficulty found in dealing with the character or nature of the combination. Compare this with the absolute inoperativeness of the criminal provisions from 1890 to 1907. The reason for the difference must be found in the fact that the proceeding in equity was not vindictive, but remedial, applying penalties only in case of disobedience to the decrees of the court.

It was the equity jurisdiction feature of the Sherman act which saved it from failure, and the feature therefore deserves some further consideration.

The restraining orders obtained by the government were relatively simple of operation where it was a question of discontinuing combinations between separate concerns, as in the Traffic cases. An annulment of a trust arrangement of the old type whereby the

[1] *Eilenbecker* v. *Plymouth County*, 134 U.S., 31.

securities of different companies were placed in the hands of trustees for united control, would likewise present no serious difficulty. It is of course a different question whether such decrees would be effective in suppressing concerted action of an informal character, or so-called gentlemen's agreements or understandings, or voluntary and spontaneous co-operation.

The task of the court of equity was much less simple in dealing with a holding company of the type of the Northern Securities Company, or of the Standard Oil or American Tobacco Company. A mere injunction would not meet the case, nor even a decree of dissolution without further judicial control. The Supreme Court confessed to inability "to formulate a remedy which could restore in their entirety the prior lawful conditions."

It is therefore instructive to note how the problem of equitable relief was handled in the Tobacco case. The decision of the Supreme Court in the Tobacco case, in sending the case back to the Circuit Court, had embodied in its mandate a contingent direction of a receivership and a forced sale. The Sherman act conferred upon the courts no such power in terms, and if the question were open for discussion, it might be contended that in a purely statutory proceeding none but statutory powers can be exercised. However that may be, by holding over the parties the threat of forced sale the Circuit Court was enabled to induce them to agree to a scheme of reorganization which the court by its own admission had no power to force upon them without their consent.

> Had it not been for the mandate of the Supreme Court [the Circuit Court said (191 Fed., 384)] it might be questioned whether a circuit court of the United States had any jurisdiction to recreate a new group of corporations out of the elements into which a pre-existing group of corporations had been split, or to formulate a plan or method according to which individuals, natural or corporate, were to be invited to invest money and embark in business. All such questions are, of course, resolved for us by the decision of the court of last resort.

The Tobacco Company was thus split up into fourteen new organizations. The defendant corporations are prohibited from causing any conveyances of factories or plants to be made by any of the new corporations to any other of such corporations or from

placing the stock of any such corporations in the hands of voting trustees. The new corporations are prohibited from keeping the same clerical organization or offices, from holding capital stock in any other company, from doing business in the name of a subordinate company, from refusing to sell one brand of tobacco except on condition of the purchaser taking other brands, etc. For the term of five years no officer or director of any of said new corporations is to serve as officer or director of any other of such corporations. The corporations are to maintain no common purchasing or selling agents and they are to render each other no financial aid, and for the term of three years twenty-nine of the individual defendants, being the largest holders of stock, are prohibited from increasing their holdings of stock by purchases from outside parties. All these conditions have been accepted by the parties.

We are less concerned with the legality or illegality of this exercise of judicial power than with the fact of its exercise and its effect. In view of the decree in the Tobacco case the Sherman act assumes a new significance; for this decree has demonstrated and established the constructive and reconstructive power of the remedy in equity. It is obvious that with the great economic forces that lie back of industrial combination a policy of mere inhibition must in the long run be as ineffectual as a policy of punishment must be ineffectual from the very start. What has been demanded on all sides during the last few years is a positive principle of guidance by which great undertakings can be legalized within the limits of a public policy which condemns monopolies and the suppression of competition. In reconstructing the tobacco enterprises, equity has made at least a beginning in this direction. It has laid down standards of size and of the proportion of the country's business which falls short of monopoly, and the precedents thus set will be influential not only in future organizations, but also in future legislation. Of course it is not to be expected that judicial regulation will furnish an adequate or the final method of dealing with trusts: it is *ex post facto*, dilatory, expensive, and may seriously disturb vested rights.

We are reminded of the history of railroad rate regulation. After the courts had proclaimed the principle of reasonableness, they

attempted to apply it; but they were not equal to the task, and eventually it had to be committed to an administrative commission. And so, in the matter of trusts, judicial regulation will merely point and open the way for regulative legislation, to be administered by way of guidance and prevention. When the historian of the future comes to survey the evolution of the anti-trust legislation in the United States, he will record the futility and failure of the attempt to deal with difficult economic problems through criminal punishment; but he will also see therein another illustration of the astonishing flexibility of equitable jurisdiction, which here as so often before has anticipated statutory reform, and which has enabled the United States to cope with certain powerful organizations at a time when all other nations stood helpless before trusts and syndicates. And he will conclude that the framers of the Sherman act builded better than they knew.

ERNST FREUND

THE UNIVERSITY OF CHICAGO